Supreme Court, U.S.
FILED

96 589 OCT 15 1996

OFFICE OF THE CLERK

No. ____

In The

Supreme Court of the United States

October Term, 1996

SISSETON-WAHPETON SIOUX TRIBE, of the Lake Traverse Indian Reservation, North Dakota and South Dakota; DEVILS LAKE SIOUX TRIBE, of the Devils Lake Sioux Indian Reservation, North Dakota; SISSETON-WAHPETON SIOUX COUNCIL, of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana,

Petitioners,

v.

UNITED STATES OF AMERICA; MANUEL LUJAN, JR., individually and in his capacity as Secretary of the Interior; NICHOLAS BRADY, individually and in his capacity as Secretary of the Treasury,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BERTRAM E. HIRSCH
81-33 258 Street
Floral Park, New York 11004
(718) 347-3022

Counsel for Petitioners

October 14, 1996

43 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the Secretary of the Interior, having made a commitment to the Congress to employ a particular standard in determining eligibility to share in a judgment fund awarded to the petitioners, may change the eligibility standard after Congress, in reliance on the Secretary's commitment, has enacted a judgment fund distribution plan under which 96.7% of those eligible to share pursuant to the Secretary's post-enactment standard are not eligible distributees.

Does the Secretary's change of the eligibility standard and enlargement of the class of beneficiaries violate the distribution Act, petitioners' right to the due process of the law, and the Secretary's trust responsibility to the petitioners.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Writ	4
The case raises important questions of federal law	4
I. The court of appeals' decision expands the discretion of the Secretary of the Interior in conflict with the express terms of the 1972 Act and an applicable decision of this Court	4
II. The court of appeals' decision ratifies the Secretary of the Interior's implementation of the 1972 Act, an implementation that violates petitioners' right to the due process of the law	8
Conclusion	12
Appendix	
Opinion of the United States Court of Appeals for the Ninth Circuit	APP. 1

Opinion of the United States District Court for the District of Montana.....APP. 8

Constitutional provisions and statutes involved.....APP. 21

TABLE OF AUTHORITIES

Page

CASES:

Chippewa Indians v. United States, 301 U.S. 358 (1937)..... 11

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977)..... 8

Littlewolf v. Lujan, 877 F.2d 1058 (D.C. Cir. 1989)..9, 11

Morrison v. Work, 266 U.S. 481 (1925)..... 11

Morton v. Ruiz, 415 U.S. 199 (1974)..... 7

Seminole Nation v. United States, 316 U.S. 286 (1942)..... 12

Sisseton and Wahpeton Bands or Tribes v. United States, 18 Ind.Cl.Comm. 526-a (1967)..... 2

Sisseton-Wahpeton Sioux Tribe v. United States, 686 F.Supp. 831 (D.Mont. 1988), aff'd., 895 F.2d 588 (9th Cir. 1990), cert. den., 498 U.S. 824 (1990).. 2

Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588 (9th Cir. 1990), cert. den., 498 U.S. 824 (1990).....3, 8

Sisseton-Wahpeton Sioux Tribe v. United States, 90 F.3d 351 (9th Cir. 1996).....1, 3

United States v. Dann, 470 U.S. 39 (1985)..... 9

CONSTITUTION AND STATUTES:

United States Constitution Fifth Amendment.....3, 9, 11

Act of June 19, 1968, 82 Stat. 239..... 2

Sisseton and Wahpeton Mississippi Sioux Tribe Distribution of Judgment Fund Act of October 25, 1972, 86 Stat. 1168-1170..... 1

25 U.S.C. §1300d-3(b) 2, 4, 6, 7, 9, 10, 11, 12

25 U.S.C. §1300d-4(a).....2, 10

28 U.S.C. §1254(1)..... 1

28 U.S.C. §1331..... 1

28 U.S.C. §1346(a)(2)..... 1

28 U.S.C. §1361..... 1

28 U.S.C. §1362..... 1

MISCELLANEOUS:

H.Rep.No. 91-1150, 91st Cong.
2d Sess. (June 4, 1970)..... 6

S.Rep.No. 91-1339, 91st Cong.
2d Sess. (October 13, 1970)..... 6

S.Rep.No. 92-144, 92nd Cong.
1st Sess. (June 4, 1971).....6, 7

118 Cong. Rec. 36040
(October 13,1972)..... 7

F. Cohen, Handbook of Federal
Indian Law (1982 ed.)..... 9

OPINIONS BELOW

The opinion of the court of appeals (APP. 1-7) is reported at 90 F.3d 351. The opinion of the district court (APP. 8-20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Fifth Amendment, Due Process Clause.

2. 25 U.S.C. § 1300d et seq. (selected provisions)

Due to their length, the constitutional and statutory provisions involved are set out in the Appendix (APP. 21-23).

STATEMENT OF THE CASE

Jurisdiction in the district court was based on 28 U.S.C. §§ 1331, 1346(a)(2), 1361 and 1362.

In this case, three Indian tribes seek to block the distribution of more than $13 million of judgment funds awarded to them,

to persons whom petitioners claim have no statutory, constitutional or other legal entitlement to the monies.

Based on a settlement agreement between the petitioners and the United States, the Indian Claims Commission, in 1967, entered judgment against the United States and in favor of the petitioners for nearly $6 million in additional compensation for the taking of some 27 million acres of land in an 1830 and an 1851 treaty. Sisseton and Wahpeton Bands or Tribes, et al. v. United States, 18 I.C.C. 526-a (1967). See also, Sisseton-Wahpeton Sioux Tribe, et al. v. United States, et al., 686 F.Supp. 831, 833 (D. Mont. 1988), aff'd., 895 F.2d 588 (9th Cir. 1990), cert. den., 498 U.S. 824 (1990). In 1968, Congress appropriated money to satisfy this judgment. Act of June 19, 1968, 82 Stat. 239.

In 1972, Congress apportioned 25.0225% of the monies awarded to petitioners "to Sisseton and Wahpeton Mississippi Sioux Tribe lineal descendants, *i.e.*, persons who are not eligible for membership in any of the plaintiff tribes, but who can trace their lineal ancestry to someone who once was a tribal member. 25 U.S.C. §§ 1300d-3(b), 1300d-4(a)." Sisseton-Wahpeton Sioux Tribe, et al. v. United States, et al., supra, 686 F.Supp. at 833. The "lineal descendants'" portion of the petitioners' judgment is undistributed and remains in

the United States Treasury. With accumulated interest, this portion is now more than $13 million.

In 1987, the tribes brought this action to challenge that part of the 1972 distribution Act which directs a distribution to lineal descendants. In affirming the dismissal of petitioners' claims on statute of limitation grounds, the court of appeals noted that "only if the number of lineal descendants were exceptionally small might the Tribes claim that the distribution plan ultimately is irrational" and "unfair" in violation of the Due Process Clause of the Fifth Amendment. Sisseton-Wahpeton Sioux Tribe, et al. v. United States, et al., 895 F.2d 588, 594 (9th Cir. 1990), cert. den., 498 U.S. 824 (1990).

On remand, petitioners amended their complaint to allege that the statutory distribution plan is irrational because it allocated 25% of the judgment to an "exceptionally small" group.

Petitioners maintained that the 1972 distribution Act required persons claiming Sisseton and Wahpeton Mississippi Sioux Tribe ancestry to trace their ancestry to a lineal ancestor who was a member of that aboriginal tribe, an entity that ceased to exist in 1862. 90 F.3d at 354. It is undisputed, that no more than 65 of the 1,969 persons approved by the Secretary of

the Interior as "lineal descendants" identified such an ancestor. Most of the others traced ancestry to a person born in the twentieth century.

The court of appeals rejected petitioners' argument, concluding that the Secretary of the Interior had reasonably exercised his discretion under the 1972 distribution Act to approve as lineal descendants anyone "whose names or the name of a lineal ancestor appears on any available records and rolls acceptable to the Secretary." Id., quoting 25 U.S.C. § 1300d-3(b).

REASONS FOR GRANTING THE WRIT

THE CASE RAISES IMPORTANT QUESTIONS OF FEDERAL LAW

I. The court of appeals' decision expands the discretion of the Secretary of the Interior in conflict with the express terms of the 1972 Act and an applicable decision of this Court.

The 1972 distribution Act directs the Secretary of the Interior to "prepare a roll of the lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe...whose names or the name or a lineal ancestor appears on any available records and rolls available to the Secretary...." 25 U.S.C. § 1300d-3(b). The

unambiguous operative command of the statute is to identify "lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe." Instead of focussing on this, the court of appeals ratified the Secretary's "lineal descendancy" list because it concluded that, under the statute, the Secretary had the discretion to use various twentieth century rolls in preparing the lineal descendancy roll.[1]

The authorization in the statute for the Secretary to use "any available records and rolls" serves but one substantive purpose, i.e., to identify "lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe." The records and rolls are only a tool to accomplish this purpose.

It is virtually axiomatic that to qualify as a lineal descendant of the Sisseton and Wahpeton Mississippi Sioux Tribe one must identify a Sisseton and Wahpeton Mississippi Sioux Tribe lineal ancestor. Since this aboriginal entity ceased to exist in 1862, to qualify as a lineal descendant ancestry must be traced to a person who was a member of that

---

[1] Petitioners referred the courts below to various nineteenth century annuity and census rolls of the Sisseton and Wahpeton Sioux contemporaneous with the existence of the aboriginal tribe. The Secretary did not use any of these.

aboriginal entity. Otherwise the very purpose of the statute is undermined. Therefore, the Secretary does not have the discretion to use records and rolls that fail to establish lineal descendancy from an ancestor who was a member of the aboriginal entity. The court of appeals' contrary conclusion ignores the express command of the statute.

This conclusion is not only dictated by the unambiguous language of § 1300d-3(b) but by the representations made by the Secretary to the Congress in connection with enactment of the 1972 distribution Act and the action taken by Congress in reliance on those representations. The Secretary repeatedly assured the Congress that "the individual, to participate [in the distribution], must be able to trace lineal descent from members of the aboriginal bands." S.Rep. No. 92-144. 92nd Cong. 1st Sess. 5 (June 4, 1971). See also, H.Rep.No. 91-1150, 91st Cong. 2d Sess. 7-8 (June 4, 1970) and S.Rep.No. 91-1339, 91st Cong. 2d Sess. 6-8 (October 13, 1970) where the Secretary informed Congress that the distribution would be made only to "descendants who can trace their lineal ancestry to a member of the ... [aboriginal] Sisseton-Wahpeton Bands."

Congress enacted the 1972 distribution Act in reliance on these representations. Not only was the Secretary's letter

included in the Senate Report, the Committee on Interior and Insular Affairs emphasized that the distribution to lineal descendants would be restricted to persons having "proof of lineal descendancy with the aboriginal band." S.Rep.No. 92-144, supra, at 3. Similarly, when the House considered the measure, Wayne Aspinall, Chairman of the Committee on Interior and Insular Affairs, informed the House that to participate in the distribution, "lineal descendants" must "show that they are direct lineal descendants of a member of the aboriginal tribe." 118 Cong.Rec. 36040 (October 13, 1972).

Having made clear to the Congress that "any available records and rolls" would be used only to verify that a putative lineal descendant had an identifiable lineal ancestor who was a member of the aboriginal Sisseton and Wahpeton Mississippi Sioux Tribe, the Secretary is required to adhere to this standard. Morton v. Ruiz, 415 U.S. 199 (1974) (where Congress has enacted legislation based on representations made by the Secretary, these representations, and not a later interpretation of the statute by the Secretary, are the basis of congressional intent, 415 U.S. at 229-230, and any action by the Secretary inconsistent with such representations is unfair and violates the Government's trust obligations to Indian tribes. 415 U.S. at 236-237).

The court of appeals' conclusion that the Secretary has the discretion to deviate from this standard misconstrues the statute, unconstitutionally endows the Secretary with legislative powers, i.e., the power to change the class of distributees to whom Congress restricted the distribution, violates the Secretary's trust obligations to the petitioners, and, by allowing the Secretary to change the congressionally defined class of distributees, denies the due process of the law to petitioners, the statute's beneficiaries.

II. The court of appeals' decision ratifies the Secretary of the Interior's implementation of the 1972 Act, an implementation that violates petitioners' right to the due process of the law.

As the court of appeals observed, "Congress is not at liberty to disburse Indian Claims Commission judgment funds to anyone it chooses." Sisseton-Wahpeton Sioux Tribe v. United States, supra, 895 F.2d at 595. The distribution plan should be disturbed if it is not "'tied rationally to the fulfillment of Congress' unique obligation'" to the tribe. Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 84-85 (1977) (citation omitted). Accord, Sisseton-Wahpeton Sioux Tribe v. United States, supra, 895 F.2d at 590 n. 1.

Measuring § 1300d-3(b), as implemented by the Secretary, against this due process standard, for judging the constitutionality of a congressional plan for the distribution of an Indian judgment fund, compels the conclusion that § 1300d-3(b) is not tied rationally to the fulfillment of Congress' unique obligation to petitioners.

In order for § 1300d-3(b) to satisfy the "tied rationally" standard, "the means chosen to achieve" congressional objectives must "comport with the requirements of the Fifth Amendment...." and must be "reasonably related to ...[the Government's] trust responsibility" to the Tribes. Littlewolf v. Lujan, 877 F.2d 1058, 1064 (D.C. Cir. 1989); F. Cohen, Handbook of Federal Indian Law 219 (1982 ed.).

Any analysis of the means chosen to achieve congressional ends must be begin with Congress' "stated justification" for the statute. Littlewolf v. Lujan, supra, 877 F.2d at 1064. Here, the stated objective or justification for § 1300d-3(b) was, as the district court comprehended, to provide "compensation [to lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe]...[for] the Treaty violations visited upon their ancestors." APP. 19. Implicit in this objective is the converse, viz., that compensation is not to be provided to any

person who is not a Sisseton and Wahpeton Mississippi Sioux Tribe lineal descendant, i.e., any person who has not identified an ancestor who was a victim of the treaty violations for which the judgment funds are intended as compensation. Payment to such persons would defeat the express congressional objective of § 1300d-3(b) and, accordingly, fails the "tied rationally" test by nullifying the "unique obligation" of the United States to compensate only proven descendants of members of the Sisseton and Wahpeton Mississippi Sioux Tribe.

The irrationality of the distribution plan, as implemented, is starkly underscored by the undisputed fact that only an "exceptionally small" number of the "lineal descendants" approved by the Secretary to share in the distribution are actually qualified to participate in any distribution under § 1300d-3(b). If these 65 persons were permitted to share the 25.0225% of the judgment fund set aside for "[a]ll other Sisseton and Wahpeton Sioux," 25 U.S.C. § 1300d-4(a), each would receive more than 60 times the amount allocated for the petitioners and their members,[2] a palpably irrational and

---

[2] This calculation is premised on a per capita distribution to petitioners' members of the amounts allocated to the petitioners.

"unfair" distribution that is clearly not tied rationally to the Government's unique obligation to the petitioners and, therefore, violates the Due Process Clause of the Fifth Amendment.

The Secretary's implementation of the 1972 distribution Act fails the "tied rationally" test for yet another reason. The proposed distribution to the § 1300d-3(b) "lineal descendants" is not "reasonably related to ...[the Government's] trust responsibility" to the petitioners. Littlewolf v. Lujan, supra, 877 F.2d at 1064. The Government, "as trustee for the Tribe[s]" is "responsible for ensuring that" Indian Claims Commission judgment funds are "put to productive use and ultimately distributed in a manner consistent with the best interests of the Tribe[s]." United States v. Dann, 470 U.S. 39, 49-50 (1985). The "United States, as a fiduciary, is obligated to" "ensur[e] that the money will be applied to the benefit of the Tribe[s]." Id. at 50 n. 13. Accord, Chippewa Indians v. United States, 301 U.S. 358, 375-376 (1937); and Morrison v. Work, 266 U.S. 481, 485 (1925) (both holding that in the exercise of its trust responsibility with respect to the management and disposition of tribal property, Congress must "promote the welfare" of the tribe).

In carrying out its trust

responsibilities, the Government's "conduct as disclosed in the acts of those who represent it in dealings with the Indians, should...be judged by the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942). Here, the Secretary of the Interior promised both the Congress and the Tribes that the judgment funds would be distributed only to persons who could prove that they had an ancestor who was a member of the Sisseton and Wahpeton Mississippi Sioux Tribe. The Secretary's decision to distribute 96.7% of the funds, allocated to the § 1300d-3(b) class of lineal descendants, to 1,904 persons who have not proven such ancestry neither "promote[s] the welfare" of or is in "the best interests of the Tribe[s]" and, therefore, is a clear breach of the Secretary's trust responsibility to the Tribes and their members.

CONCLUSION

For the foregoing reasons this Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

October 14, 1996

Respectfully submitted,

BERTRAM E. HIRSCH
81-33 258 Street
Floral Park, N.Y. 11004
(718) 347-3022

Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SISSETON-WAHPETON SIOUX TRIBE, of the Lake Traverse Indian Reservation, North Dakota and South Dakota, individually and in its parens patriae capacity on behalf of its members; DEVILS LAKE SIOUX TRIBE of the Devils Lake Sioux (Fort Totten) Indian Reservation, North Dakota, individually and in its parens patriae capacity on behalf of its members; SISSETON-WAHPETON SIOUX COUNCIL, of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana, individually and in its parens patriae capacity on behalf of its members,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; MANUAL LUJAN, JR., individually and in his capacity as Secretary of the Interior; NICHOLAS BRADY, individually and in his capacity as Secretary of the Treasury,

Defendants-Appellees.

No. 95-35135

D.C. No. CV-87-00095-PGH

OPINION

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
June 6, 1996—Seattle, Washington

Filed July 15, 1996

Before: James R. Browning, Eugene A. Wright, and Thomas G. Nelson, Circuit Judges.

Per Curiam

OPINION

PER CURIAM:

I.

In 1987, three Native-American Sioux Tribes filed this suit contending Congress should not have allocated 25% of an Indian Claims Act judgment fund to nonmember lineal descendants of the aggrieved aboriginal tribe, which had dispersed in the 1860s. The plaintiff Tribes asserted eight claims for relief, including due process, unconstitutional taking, breach of contract, and breach of the 1968 Appropriations Act.

The district court dismissed the case on the ground that all of the claims were barred by the six-year statute of limitations (28 U.S.C. § 2401); we affirmed, with one exception. *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 591-92 (9th Cir. 1990). Because the Secretary of the Interior did not compile the list of nonmember lineal descendants of the aboriginal tribe until 1987, the plaintiff Tribes did not know the number of persons who would share in the 25% of the judgment allocated to nonmember lineal descendants, and plaintiffs' due process claim based upon the disproportion

between the number of nonmember lineal descendants and the share of the judgment allocated to this group did not accrue until 1987. We noted, however, that "only if the number of lineal descendants were exceptionally small might the Tribes claim that the distribution plan ultimately is irrational." *Id.* at 594.

On remand, the plaintiff Tribes amended their complaint to allege, inter alia, that the statutory distribution plan was irrational because it allocated 25% of the judgment to an "exceptionally small" group. The district court granted summary judgment for the government, and the plaintiff Tribes appeal.

II.

According to the plaintiff Tribes, only 65 of the 1,969 persons on the Secretary's list have proven they are in fact lineal descendants of the aboriginal tribe. The plaintiff Tribes argue that 65 persons is an "exceptionally small" group.

The plaintiff Tribes reduce the Secretary's list from 1,969 to 65 by applying a strict standard of proof to establish a nonmember is a lineal descendant of the aggrieved aboriginal tribe. They contend nonmembers must identify an ancestor who was a member of the aboriginal tribe in 1862, when the tribe dispersed. The plaintiff Tribes argue that because the aboriginal tribe ceased to exist after 1862, every lineal descendant is necessarily related to an individual who was a member of the aboriginal tribe prior to 1862.

The meaning of "lineal descendant" is not subject to dispute, but the parties disagree as to the proof required to establish lineal descendance from a member of the aboriginal tribe.

The Secretary did not require nonmembers to identify an ancestor who was alive in 1862, accepting post-1862 lists as adequate proof of lineal descent.

We review the Secretary's interpretation of the Act de novo, *Tang v. Reno*, 77 F.3d 1194, 1196 (9th Cir. 1996), and first determine "whether Congress has directly spoken to the precise question at issue." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). If "the statute is clear and unambiguous that is the end of the matter." *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (quotations omitted).

[1] We agree with the Secretary that the Act unambiguously leaves the standard of proof to the Secretary's discretion, directing the Secretary to prepare a list of persons "whose names or the name of a lineal ancestor appears on *any available records and rolls acceptable to the Secretary*." 25 U.S.C. §§ 1300d-3(b); 1300d-4(a) (emphasis added). As the government notes, this language does not suggest the applicant must identify an ancestor alive before 1862. In fact, the Act explicitly allows the Secretary to include nonmembers who have not identified an ancestor alive before 1862, as long as the name of the nonmember or of a lineal ancestor is on a list acceptable to the Secretary.

[2] Even if the Act were not clear on its face, we would affirm. The legislative history does not discuss the standard of proof, and the Secretary's decision to adopt an inclusive standard of proof is unquestionably reasonable. Bona fide lineal descendants might have difficulty identifying ancestors alive in 1862, particularly since the aboriginal tribe scattered. The Secretary's standard ensures that more bona fide lineal descendants will be compensated, promoting Congress's goal of compensating all descendants of the aboriginal tribe. *See Aluminum Co. of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380, 389 (1984) ("[T]o uphold [an agency's construction of a statute] we need not find that [its] construc-

tion is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. . . . We need only conclude that it is a reasonable interpretation of the relevant provisions.").[1]

III.

[3] Although the 1,969 nonmembers will each receive $746, while tribal members will receive an average of $372, the statutory allocation is not irrational and does not violate due process. Congress specifically rejected a proposal to distribute the judgment fund on an equal, per capita basis, choosing instead to allocate lump sum shares to four groups based on the 1909 McLaughlin Annuity roll. When Congress acted, no one knew the precise number of persons in each category. As the plaintiff Tribes themselves argued, the 1909 roll was the most inclusive list:

> The tribes maintain that the 1909 roll, which contains no blood quantum restriction, is the roll nearest

---

[1]The plaintiff Tribes have not demonstrated that the Secretary's decision to use post-1862 rolls is irrational or has led to an arbitrary list. The Secretary concluded that nonmembers were entitled to share in the fund if either they or an ancestor were on any one of the following lists, among others: 1909 Sisseton and Wahpeton Annuity Roll, 1932 Sisseton and Wahpeton Annuity Roll, 1940 Sisseton-Wahpeton Base Roll, 1944 Devils Lake Base Roll, 1960 Assiniboine-Sioux Tribal Roll, 1974 Sisseton-Wahpeton Payment Roll, 1974 Devils Lake Payment Roll, 1979 Fort Peck Sisseton-Wahpeton Payment Roll. While these lists may contain individuals who were not, in fact, lineal descendants of the aboriginal tribe, the plaintiff Tribes have not shown or even argued that they are so inaccurate that the Secretary's decision to use them was irrational.

> in time to the taking of the land from the parent bands, particularly with respect to the . . . award based on an 1852 cession, and, ***in view of its all-inclusive nature, the single roll best suited to determine the apportionment of the funds.***

H.R. 92-1369 at 10 (emphasis added).

[4] The plaintiff Tribes argue the distribution scheme violates equal protection because tribal members and nonmembers receive different shares, and that this claim also remains open because the plaintiff Tribes did not know the nonmembers would receive a higher per capita award until the Secretary compiled the list of nonmembers in 1987. When Congress rejected a per capita distribution and decided instead to distribute the fund in lump sums to the various groups based on the 1909 roll, the possibility of unequal distribution per capita was obvious. If the plaintiff Tribes believed nonmembers and members should receive equal individual shares, they should have challenged the distribution scheme long before they filed this suit. Instead, after public deliberation, the plaintiff Tribes approved the plan to allocate a lump sum to each group based on the 1909 roll. *Sisseton-Wahpeton I*, 895 F.2d at 591-92.

IV.

[5] The plaintiff Tribes argue that because some persons on the Secretary's list might not, in fact, be bona fide lineal descendants, the distribution plan constitutes a taking from the plaintiff Tribes compensable under the Fifth Amendment. We rejected this argument in *Sisseton-Wahpeton I*, noting that the 25% share belongs to bona fide nonmember lineal descendants, not the plaintiff Tribes. The plaintiff Tribes will receive 75% of the judgment fund no matter how many nonmembers are identified. *Sisseton-Wahpeton I*, 895 F.2d at 594.

V.

[6] The plaintiff Tribes allege the district court erred in denying their motion to amend the complaint to add due process and equal protection claims. We "review denial of leave to amend for abuse of discretion, 'but such denial is strictly reviewed in light of the strong policy permitting amendment.' " *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991) (quoting *Moore v. Kayport Package Express*, 885 F.2d 531, 537 (9th Cir. 1989)). However, "[a]bsent a definite and firm conviction that the district court committed clear error of judgment, we will not disturb the district court's decision." *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). "The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." *Id.* (quoting *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989)).

[7] We consider "(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether plaintiff has previously amended his complaint." *Id. See also United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502, 1511 (9th Cir. 1991).

[8] The fourth and fifth factors, futility and prior amendment, are dispositive in this case. The plaintiff Tribes concede the proposed claim is "similar to the claims [already] asserted in the second amended complaint." It adds nothing to the claims already at issue in this appeal. Because the proposed claim would be redundant and futile, the district court did not err in denying leave to amend. It is time for this litigation to end.

AFFIRMED.

APP. 8

FILED
'94 SEP PM 3 44
LOU ALEKSICH, JR., CLERK
BY CAROL A. DAHLEY
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

SISSETON-WAHPETON SIOUX TRIBE of the Lake Traverse Indian Reservation, North Dakota and South Dakota, individually and in its parens patriae capacity on behalf of its members; DEVILS LAKE SIOUX TRIBE of the Devils Lake Sioux (Fort Totten) Indian Reservation, North Dakota individually and in its parens patriae capacity on behalf of its members; SISSETON-WAHPETON SIOUX COUNCIL of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana, individually and in its parens patriae capacity on behalf of its members,

Plaintiffs,

vs.

FILED, ENTERED AND NOTED IN CIVIL DOCKET
Sept. 28, 1994

LOU ALEKSICH, JR., CLERK

BY CAROL A. Dahley
Deputy

No. CV-87-095-GF

UNITED STATES OF AMERICA, MANUEL LUJAN, individually and in his capacity as Secretary of the Interior; NICHOLAS BRADY, individually and in his capacity as Secretary of the Treasury,	AMENDED MEMORANDUM AND ORDER
Defendants.	

FILED, ENTERED IN
CIVIL JUDGMENT BOOK
VOLUME 26, PAGE 42

The Sisseton-Wahpeton Sioux Tribe, the Devils Lake Sioux Tribe, and the Sisseton-Wahpeton Sioux Council of the Assiniboine and Sioux Tribes ("The Tribes") instituted the present action challenging the 1972 law that established the plan for distribution of a judgment entered by the Indian Claims Commission in satisfaction of a compromise settlement effected between the Tribes and the United States. 25 U.S.C. §§ 1300d-3, 1300d-4 ("1972 Distribution Act"); Sisseton-Wahpeton Bands or Tribes v. U.S., 18 Ind.Cl.Comm. 526-1 (1967). This court previously dismissed the action, having concluded it was time-barred by the six-year statute of limitations imposed by 28 U.S.C. § 2401(a). Sisseton-Wahpeton Sioux Tribe v. U.S., 686 F.Supp. 831 (D. Mont. 1988). This court's dismissal was affirmed by the Ninth Circuit Court of Appeals. Sisseton-Wahpeton Sioux Tribe v. U.S., 895 F.2d 588 (9th Cir. 1990), cert. denied, 111 S.Ct. 75 (1990).

The facts underlying this action are not in dispute and are succinctly summarized in the opinion of the Ninth Circuit. 895 F. 2d at 590. For purposes of the present discussion, it is unnecessary to detail those facts. Of import to the present analysis is the following observation made by the Ninth Circuit:

> The Tribes also argue that their claims are based in part on the number of persons certified as 'lineal descendants', a fact which they could not know until the roll was completed. They complain that the per capita award will be lower for tribal members than for non-members. This indeed may be unfair. However, only if the number of lineal descendants were exceptionally small might the Tribes claim that the distribution plan ultimately is irrational. This does not appear to be the claim they make. We do not, however, rule out the Tribes amending the complaint to state facts supporting such a claim.

895 F.2d at 594.

Consistent with the foregoing intimation, the Tribes were allowed to file an amended complaint for the purpose of stating facts to support a claim that the plan of distribution embodied in the 1972 Distribution Act is irrational based upon the "exceptionally small" number of lineal descendants to whom a substantial portion of the judgment funds, i.e., 25%

will be distributed. The Tribes now move for summary judgment pursuant to Fed.R.Civ.P. 56. The Tribes' motion for summary judgment is partial in nature, seeking a determination that the number of lineal descendants entitled to a proportionate share of the judgment fund is "exceptionally small".[1] The Secretary of the Interior, in turn, has filed a cross-motion for summary judgment.

I.

The 1972 Distribution Act apportioned the judgment fund "on the basis of Reservation residence and other residence as shown on the 1909 McLaughlin Annuity

---

[1]. The Tribes predicate their claims for relief upon the assertion that a distribution of the judgment funds to an irrationally small number of lineal descendants would operate to deprive them of the rights secured them by the due process and just compensation clauses of the fifth amendment to the federal Constitution. In presenting their motion for partial summary judgment to the court, The Tribes expressly advise the court they are not, at this juncture, seeking a determination upon the legal merit of their claims.

Roll" as follows: 22% to Devils Lake Sioux of North Dakota, 43% to Sisseton-Wahpeton Sioux of South Dakota, 10% to Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana, 25% to all other Sisseton and Wahpeton Sioux. 25 U.S.C. § 1300d-4(a). The Act further provided in pertinent part as follows:

> The Secretary of the Interior shall prepare a roll of the lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe who were born on or prior to and are living on the date of this Act whose names or the names of (sic) lineal ancestor appears on any available records and rolls acceptable to the Secretary, and who are not members of any of the organized groups listed in subsection (a).

25 U.S.C. § 1300d-3(b).

The roll of lineal descendants prepared by the Secretary of the Interior, and completed in April of 1987, lists 1,969 individuals. In order to qualify for inclusion on the distribution roll, the claimant needed to establish that he or she was a lineal descendant of the

Sisseton and Wahpeton Mississippi Sioux Tribe, was born on or prior to and living on October 25, 1972, and was not a member of any of the organized groups listed in 25 U.S.C. § 1300d-3(a).

Ms. Karen Joseph, Tribal Enrollment Specialist for the Area Director, Bureau of Indian Affairs, Aberdeen, South Dakota, has filed an affidavit establishing that the individuals named on the roll are descendants by blood of members named in the following membership rolls or payment rolls:

(1) 1909 Sisseton and Wahpeton annuity roll;

(2) 1932 Sisseton and Wahpeton annuity roll;

(3) January 1, 1940, Sisseton-Wahpeton base roll;

(4) January 1, 1944, Devils Lake base roll;

(5) October 1, 1960, Assiniboine-Sioux tribal roll;

(6) April 18, 1974, Sisseton-Wahpeton payment roll;

(7) December 16, 1974, Devils Lake payment roll;

(8) May 1, 1979, Fort Peck Sisseton-Wahpeton payment roll.

Ms. Joseph also states the following source documents were used to determine eligibility if a particular claimant's ancestor was not named on any of the foregoing rolls: the Sisseton-Wahpeton, Devils Lake and Fort Peck Allotment schedules, probate records and Roll Number 507, microfilm publication for the census rolls dated 1886-91, 1893, 1895, 1897-98 of the Sisseton and Wahpeton Sioux Indians.

The Tribes do not suggest that the number of individuals meeting the delineated criteria, i.e., 1,969, is not so exceptionally small as to render the distribution scheme irrational. Rather, The Tribes argue, in essence, that the requirements for lineal descendancy adopted by the Secretary are at odds with the intent of Congress in its enactment of 25 U.S.C. § 1300d-3(b). The Tribes contend that section 1300d-3(b) must be interpreted as requiring a claimant to trace lineal descendancy to an ancestor who was a member of the aboriginal Sisseton and Wahpeton Mississippi Sioux Tribe in 1830 or 1851 (the dates of the Treaties at issue in the proceedings before the Indian Claims Commission which resulted in the establishment of the judgment fund at issue). At the very

least, the Tribes suggest, a claimant must trace ancestry to a person who was a member of the aboriginal bands in 1862, just prior to the "forced dispersal" of the bands. If section 1300d-3(b) is interpreted as imposing the former requirement, no more than 29 individuals on the current roll would qualify as a "lineal descendant". If section 1300d-3(b) is interpreted as imposing the latter requirement, no more than 168 of the individuals currently identified on the roll would qualify as "lineal descendants". The Secretary asks the court to reject the construction of section 1300d-3(b) advocated by The Tribes, characterizing the construction as an attempt to engraft additional language into what is clearly an unambiguous statute.

II.

The court's task, as in all cases of statutory construction, is to "give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." Nagonsott v. Samuels, ___U.S.___, ___, 122 L.Ed.2d 457, 465 (1993), citing, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570

(1982). In analyzing the Tribes' contentions, the court "[a]s always, [begins] with the language of the statute and ask[s] whether Congress has spoken on the subject before [the Court]. 'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Norfolk & W.R. Train Dispatchers, ___U.S.___, ___, 113 L.Ed.2d 95, 106-07 (1991).

Section 1300d-3(b) directs the Secretary of the Interior to prepare a roll of lineal descendants who were "born on or prior to and are living on the date of this Act whose names or the name of a lineal ancestor appears on any available records and rolls acceptable to the Secretary." (emphasis supplied). This language is unambiguous and cannot be construed as requiring the claimant to establish ancestry to a member of the Sisseton and Wahpeton Tribes of Sioux Indians on either the date the underlying Treaties were signed or on the date of the "forced dispersal". The court is not free to construe section 1300d-3(b) in a manner which is not in accord with the clear statement of congressional intent but must construe the language of the statute

according to its plain meaning. See, FDIC v. McSweeney, 976 F.2d 532, 537 (9th Cir. 1992), cert. denied, 124 L.Ed.2d 658 (1992). Because the language of section 1300d-3(b) is clear and unambiguous, the court need not resort to the legislative history of the statute or other extrinsic aids. U.S. v. Neville, 985 F.2d 992, 995 (9th Cir. 1993).[2]

---

[2]. The court remains mindful that even where the language of the statute under scrutiny is clear, resort may be made to the legislative history attendant to the statute to determine whether there is clearly expressed legislative intention contrary to the language of the statute. See, e.g., U.S. v. Guyler, 932 F.2d 1330, 1335 (9th Cir. 1991). Review of the legislative history attendant to the enactment of section 1300d-3(b) fails to establish the existence of a clearly expressed legislative intention contrary to the express language of the statute which would require the court to "question the strong presumption that Congress expresses its intent through the language it chooses." INS v. Cardoza-Fonseca, 480 U.S. 421, 432, n.12 (1986). The Tribes simply attempt to utilize the legislative history to support their construction of the statute in a manner that will assist them in sustaining the

The 1,969 individuals identified on the roll prepared by the Secretary are, consistent with the directive of section 1300d-3(b), entitled to share in the judgment fund. The number is not so exceptionally small as to call into question the rationality of the decision of Congress to ensure that these lineal descendants, not associated with any of The Tribes, receive a portion of the monies paid in compensation of the Treaty violations visited upon their ancestors. Therefore,

IT IS HEREBY ORDERED that The Tribes' motion for partial summary judgment be, and the same hereby is DENIED. The motion for summary judgment presented by defendants is, in turn, GRANTED and the preliminary injunction previously entered in this matter dissolved.

Finally, IT IS HEREBY ORDERED that The Tribes' motion requesting leave of court to amend their complaint is DENIED.

---

burden of establishing the number of lineal descendants, as presently determined by the Secretary, is "exceptionally small".

DATED this 28th day of September, 1994.

s/ Paul G. Hatfield

PAUL G. HATFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Constitutional provisions and statutes involved:

1. Due Process Clause, Fifth Amendment, United States Constitution.

No person shall...be deprived of life, liberty, or property, without due process of law....

2. Mississippi Sioux Tribes Distribution of Judgment Funds Act of October 25, 1972, 25 U.S.C. sec. 1300d et seq. (selected provisions).

Section 1300d. The funds appropriated by the Act of June 19, 1968 (82 Stat. 239), to pay compromise judgments to the Mdewakanton and Wahpakoota Tribe of Sioux Indians, and the Sisseton and Wahpeton Tribes of Sioux Indians, in Indian Claims Commission dockets numbered 142, 359, 360, 361, 362, and 363, together with interest thereon, after payment of attorney fees and litigation expenses and the costs of carrying out the provisions of sections 1300d to 1300d-9 of this title, shall be distributed as provided in such sections.

Section 1300d-3. (a) The Devils Lake Sioux Tribe of North Dakota, and the Sisseton and Wahpeton Sioux Tribe of South Dakota, shall bring current their membership rolls of October 25, 1972. The Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana, shall prepare rolls of their members who are lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe, who were born on or prior to and are living on October 25, 1972, and who are entitled to enrollment on their respective membership rolls in accordance with the applicable rules and

regulations of the tribe or group involved, using available records and rolls at the local agency and area offices, and any other available records and rolls. Applications for enrollment must be filed with each group named in this section and such rolls shall be subject to approval of the Secretary of the Interior. The Secretary's determination on all applications for enrollment shall be final.

(b) The Secretary of the Interior shall prepare a roll of the lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe who were born on or prior to and are living on October 25, 1972, whose names or the name of a lineal ancestor appears on any available records and rolls acceptable to the Secretary, and who are not members of any of the organized groups listed in subsection (a) of this section. Applications for enrollment must be filed with the Area Director, Bureau of Indian Affairs, Aberdeen, South Dakota. The Secretary's determination on all applications for enrollment shall be final.

Section 1300d-4. (a) After deducting the amount authorized in section 1300d of this title, the funds derived from the judgment awarded in Indian Claims Commission docket numbered 142 and the one-half remaining from the amount awarded in docket numbered 359, plus accrued interest, shall be apportioned on the basis of reservation residence and other residence shown on the 1909 McLaughlin annuity roll, as follows:

Tribe or Group	Percentage
Devils Lake Sioux of North Dakota	21.6892
Sisseton-Wahpeton Sioux of South Dakota	42.9730
Assiniboine and Sioux Tribe of the Fort Peck Reservation, Montana	10.3153
All other Sisseton and Wahpeton Sioux	25.0225

(c) The funds allocated to all other Sisseton and Wahpeton Sioux, as provided in subsection (a) of this section, shall be distributed per capita to the persons enrolled on the roll prepared by the Secretary pursuant to section 1300d-3(b) of this title.